NO. 2633

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

ROBERT WYLLIE DAVIS,
Defendant, Plaintiff in Error,

vs.

FRED HARRISON,
Plaintiff, Defendant in Error.

In Error to the Supreme Court of Hawaii.

BRIEF FOR PLAINTIFF IN ERROR

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Filed this day of , A. D. 1916.

F. D. MONCKTON, Clerk.

By.....
Deputy Clerk.

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PRELIMINARY STATEMENT.

This is a writ of error to the Supreme Court of the Territory of Hawaii, to review a judgment of that court in favor of Fred Harrison, in an action brought by him against Robert Wyllie Davis, for the purpose of having the title to certain land adjudicated and quieted.

STATEMENT OF FACTS.

On the 12th day of June, 1913, the defendant in error filed an action in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, alleging as follows:

"That the plaintiff is entitled to an undivided one-half interest for a term of years, to wit, until June 1, 1935, in all that certain piece or parcel of land situated at Koolaupoko, City and County of Honolulu, Territory of Hawaii, aforesaid, known as the land of Mokapu, and described in that certain lease from John D. Holt, Trustee, to A. V. Gear, dated January 1, 1910, and recorded in the office of the Registrar of Conveyances, in book 343, at pages 346 to 351, a copy of which lease is hereto attached and made a part hereof marked Exhibit 'A.'

"That defendant claims said undivided one-half of said land adversely to plaintiff, and plaintiff is desirous of having the title thereto adjudicated and quieted.

"That the defendant is a necessary party to the complete determination and settlement of the question of title involved herein.

"*Wherefore,* plaintiff prays that defendant be summoned to appear and answer this complaint at the January, 1913, Term hereof, unless sooner disposed of by judicial authority; that the defendant may be required to set up any adverse claim which he may have in and to said lands, and for costs."

The plaintiff in error filed a general denial to defendant in error's complaint, and upon issue had in said cause, judgment was rendered on the 26th day of June, 1914, in favor of the defendant in error.

At the trial of said cause, the defendant in error introduced evidence showing the following facts:

That on August 16, 1892, John K. Sumner conveyed the land in question, which consisted of 432 acres, to Bruce Cartwright, in trust, "in the first place to pay the rents, issues and profits arising therefrom and thereout so long as the lease now in existence is in force" to the grantor, "and upon the

expiration of the present lease, or other sooner determination thereof, to pay the rents, issues and profits arising from and out of said lands," to the grantor's nephew, Robert Wyllie Davis, the present plaintiff in error, "during the term of his natural life, or in the discretion of the said Robert Wyllie Davis, to permit him to reside upon said premises and while so residing to use the same for grazing and agricultural purposes, and in the second place, from and after the death of the said Robert Wyllie Davis, to convey the said premises to the heirs of the body of the said Robert Wyllie Davis, and failing said heirs, then to the wife of the said Robert Wyllie Davis, and failing said wife, then to convey the said premises unto the heirs at law of the said Robert Wyllie Davis share and share alike."

That Cartwright resigned as trustee, and that John D. Holt was, on August 29, 1902, appointed as his successor by a court of equity; that on June 1, 1910, Holt as trustee, executed a lease of the property to A. V. Gear for twenty-five (25) years from June 1, 1910; that on August 4, 1910, plaintiff in error signed and acknowledged the following statement relating to the lease just mentioned:

"Know all men by these presents, that I, Robert Wyllie Davis, of Mokapu, Koolaupoko, Island of Oahu, and I, Mary Kealohanui Davis, wife of Robert Wyllie Davis, do each of us give our consent to the foregoing lease, ratifying and confirming the same on behalf of any interest we have or which may hereafter accrue to either of us in the future under the terms of the aforesaid deed of trust."

That on June 16, 1910, A. V. Gear executed an assignment to plaintiff in error of an undivided one-half interest in the Holt lease and in the term thereby demised, the instrument of assignment not appearing, however, to have been signed by the plaintiff in error.

A. V. Gear's remaining undivided one-half in the land and in the demised premises passed by successive assignments to C. A. Peterson and Addie B. Gear, and finally, on October 21, 1910, to the defendant in error.

At the conclusion of the defendant in error's case, the plaintiff in error moved for a non suit upon the grounds, among others, (a) that the evidence of the defendant in error showed affirmatively that there was a lease outstanding when the lease to Gear, under which defendant in error claims, was made by Holt, trustee; (b) that defendant in error had failed to deraign his title from the government; and (c) that the statute of uses had executed the trust and that the defendant was the owner of a life interest in the property and that therefore the lease from Holt, trustee, was invalid.

The motion for a non suit was granted on the first and second grounds. The defendant in error appealed to the Supreme Court of the Territory from the court's order granting plaintiff in error's motion, which judgment was reversed.

Upon the resumption of the trial in the Circuit Court, the plaintiff in error introduced in evidence,

over the objection of the defendant in error, a warranty deed duly recorded dated January 1, 1906, executed by the plaintiff in error, purporting to convey to John K. Sumner "all my one-half undivided share and interest" in the land of Mokapu, and a mortgage by the plaintiff in error to Sumner of "all my undivided one-half share and interest" in Mokapu, dated January 2, 1906. The mortgage was also duly recorded and acknowledged.

The court below held the evidence sought to be introduced by the plaintiff was inadmissible.

After counsel for the defendant in error admitted that plaintiff in error was entitled at the time the within action was commenced, to an undivided one-half interest in the term granted June 1, 1910, the plaintiff in error rested.

The court below held that the defendant had not rebutted the *prima facie* case previously made by the defendant in error, and entered the following judgment:

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the plaintiff is the owner and entitled to an immediate possession of an undivided one-half interest for a term of years until June 1, 1935, in all of that certain piece or parcel of land situated at Koolaupoko, City and County of Honolulu, Territory of Hawaii, aforesaid, known as the land of Mokapu, and described in that certain lease from Holt, trustee, dated June 1, 1910, and recorded in the office of the Registrar of Conveyances, in book 343, at pages 346 to 351;

"That plaintiff's title and ownership in said land

for said term of years is quieted and confirmed accordingly;

"And that the plaintiff is entitled to have and recover against defendant his costs in this action taxed in the sum of forty-one and 75/100 ($41.75) dollars."

Upon the rendition of the above judgment the plaintiff in error appealed to the Supreme Court of the Territory of Hawaii, and upon March 4, 1915, the judgment of the trial court was affirmed.

After the Supreme Court entered judgment pursuant to its decision, affirming the judgment of the First Circuit Court of the Territory of Hawaii, the present writ of error was sued out.

SPECIFICATIONS OF ERROR.

The plaintiff in error relies upon the following errors assigned:

I. That the Supreme Court of the Territory of Hawaii erred in affirming the action of the Honorable W. L. Whitney, Second Judge of the said Circuit Court, in denying the motion of the defendant in said action, plaintiff in error, for a judgment of non suit, for the reason that the statute of uses executed the use.

II. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that no error had been committed by the trial court as alleged in the following seventeenth assignment of error:

"17. That the court erred in sustaining the objection of plaintiff to and rejecting the evidence offered by defendant of a deed from Robert Wyllie Davis

and wife to John K. Sumner, of an undivided one-half interest in the land known as Mokapu, dated January 1, 1906, and recorded on March 4, 1908, in liber 302, on page 192.

"Plaintiff's objection was that it was incompetent, irrelevant and immaterial, and defendant was estopped from introducing any such deed in evidence."

III. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that no error had been committed by the trial court as alleged in the following eighteenth assignment of error:

"18. That the court erred in sustaining the objection of plaintiff to and rejecting the offer of the defendant of a certain mortgage from Robert Wyllie Davis and wife to John K. Sumner, dated January 2, 1906, and recorded on March 4, 1908, in the office of the Registrar of Conveyances of the Territory of Hawaii, in liber 303, at page 91, whereby the said Robert Wyllie Davis conveyed by way of mortgage to the said John K. Sumner an undivided one-half interest in and to the land of Mokapu.

"Plaintiff's objection was that this evidence was incompetent, irrelevant and immaterial, and that defendant was estopped from introducing such mortgage in evidence."

IV. That the Supreme Court of the Territory of Hawaii erred in its judgment affirming the judgment of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, for the reason that said judgment was and is contrary to the evidence and the law.

ARGUMENT.

I.

THAT THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN AFFIRMING THE ACTION OF THE HONORABLE W. L. WHITNEY, SECOND JUDGE OF THE SAID CIRCUIT COURT, IN DENYING THE MOTION OF THE DEFENDANT IN SAID ACTION, PLAINTIFF IN ERROR, FOR A JUDGMENT OF NON SUIT, FOR THE REASON THAT THE STATUTE OF USES EXECUTED THE USE.

It is the contention of the plaintiff in error that the trust as to the life estate of Davis, is a mere passive one, as the use was executed, hence, Holt, as trustee, had no right, title or interest in the premises when he executed the lease under which defendant in error claims.

Prior to the enactment of the statute of uses, upon the creation of the trust, the trustee was always the holder of the legal title, and the *cestui que* took only the equitable estate or beneficial interest. The effect of the statute of uses was to destroy the estate of feffee to use and to transfer it by the very act that created it to the *cestui que* use as if the seisin or estate of the feffor together with the use had passed from the feffor to the *cestui que* use.

Where the *cestui que* trust is entitled to the possession of the *res* without accounting to any one, the

whole title vests in him, and the trust is passive.

Perry on Trusts, Volume 1, Section 306, contains the following:

"If, however, the trust simply is to permit and suffer A. to occupy the estate, or to receive the rents, the legal estate is executd in A. by the statute."

In *Morgan v. Morgan,* 55 S. E. (W. Va.) 391, the following language appears:

"This second clause of the provision of the deed under consideration is preceded by a clause requiring the trustees to permit the wife to occupy, possess, and enjoy the land, and the rents, issues and profits thereof, for her sole use and benefit, from etc., for and during her life, and succeeded by clauses intended to create a limitation over after the wife's death in case she should not exercise the power of disposition. Do these provisions cut down the wife's estate to an equitable estate for her life? Judge Green, delivering the opinion of this court in *Milhollen v. Rice et al.,* 13 W. V. 510, in which the provisions of a will were under consideration, laid two propositions which he considered established: First, that 'it is settled that if a testator gives property to a devisee or legatee, to use' or dispose of at his pleasure—that is, to consume or spend, sell, or give away at his pleasure—'such devisee or legatee has the fee simple or absolute property, even though his interest in it be called by the will a life estate, and there be a provision in the will whereby what may remain of the property at the death of the devisee or legatee is given to another person'."

In *Hallyburton v. Slagle,* 41 S. E. (N. C.) 877, the following language appears:

"The deed to Woodfin was a naked trust for the benefit of the *cestui que trustent.* He had not a thing to do—not even to receive the rents and pay them over. But the *cestuis que trustents* were to occupy, use and enjoy it in their own way without being accountable to any one. This gave them the entire estate."

The plaintiff in error contends that since he had the right to occupy, use and enjoy the trust property in his own way without accounting to any one, the trust was passive. The language of the trust deed "or in the discretion of the said Robert Wyllie Davis to permit him to reside upon said premises and while so residing to use the same for grazing or agricultural purposes" is sufficient to bring the life estate of Davis within the authorities above cited.

In answer to the point under consideration, the Supreme Court of the Territory of Hawaii in 22 Haw. 51, used the following language:

"Under the third ground of the motion for a non suit, the defendant's contention is that the 'trust as to the life estate to Davis is a mere passive one and the use must be considered as executed'; that 'an absolute life estate vested' in Davis, and that 'hence, the lease to Gear was a nullity, the legal and equitable estate was merged in Davis, and Holt had no title and could give no title.' It is settled in this jurisdiction that to the application of the statute of uses 'there are certain well defined exceptions or rather rules of construction which limit the effect of the statute,' that special or active trusts were never within the purview of the statute, and that 'if the purpose of the trust is to protect the estate for a given time or until the death of someone, * * * the operation of the statute is excluded and the

trusts or uses remain merely equitable estate.' *Estate of Boardman,* 5 Haw. 146, 147; *Kidwell v. Godfrey,* 14 Haw. 138, 140. The trust under consideration was, after the determination of the lease referred to in the deed, to pay the rents, issues and profits to Davis for life, or in the discretion of Davis to permit him to reside upon the land and while so residing to use it for grazing or agricultural purposes. The right was not granted to Davis to use the land directly for the remainder of his life, but only during the period or periods when he might see fit to reside on it; nor was the right given him even during these periods of residence to use the land for any and all legitimate purposes. Both the time and the manner of the use were restricted. It is obvious that one of the purposes of the trust was to protect the estate even against Davis himself, at lease until the death of Davis and thereafter to convey the remainder to those entitled under the terms of the instrument. Even as to the interest of Davis, this was not a mere passive trust. The trustee had active duties to perform for the protection of the property and the trust as to Davis is not within the operation of the statute."

We maintain that the language of the trust deed, "or in the discretion of the said Robert Wyllie Davis to permit him to reside upon said premises, and while so residing to use the same for grazing or agricultural purposes," taken together with the fact that the trustor intended the whole beneficial interest in the *res* should be vested in Davis, is sufficient to bring the life estate of Davis within the meaning of the cases which hold, that where the beneficiary is entitled to the possession of the trust property the use is executed.

We do not think it can be said that the right to

use the land for grazing or agricultural purposes was for the preservation of the estate, nor do we think if Davis chose to reside upon the land he would be compelled to use it for those specific purposes. If the trustee could lease trust property for mining purposes, or other profitable purposes than grazing or agricultural ones, why construe the deed in such a way that Davis could only use the premises for grazing and agricultural ones? If it could be said that the right to use the land for grazing or agricultural purposes was for the preservation of the property, the question arises, would not the trustor have prohibited the trustee from leasing the land for any other than grazing and agricultural purposes? Surely, if the trustee could secure a better profit by leasing the land for other purposes than those contained in the deed, it would be his duty to do so. It would follow that if the trustee could secure a larger amount of rent for leasing for other purposes than those contained in the deed, Davis would not insist upon using the premises, and, hence, the property would not be preserved. It is our opinion that the trustor's main intention was to give his nephew Davis the largest income the property would be capable of earning during his life. Is it not more in accord with the trust deed in construing the expression "to use the same for grazing and agricultural purposes" with the whole deed, to say that the trustor intended Davis should receive either the rents, issues and profits, or he could go into possession of the land himself and use it for

any purpose he desired, including grazing and agricultural ones? No doubt at the time the trust deed was executed the premises were used for grazing and agricultural purposes, and, too, it is altogether probable that the property would yield a greater amount of rent for those purposes, at that time, than for any other purposes. It appears to us, as above stated, that the right to use the land for grazing, etc., was only one of the purposes that Davis might go into possession and exercise. We maintain also that if the latter expression was for the purpose of preserving the trust property the trustor would have imposed upon the trustee the duty to lease the land for grazing or agricultural purposes exclusively.

Since the plaintiff in error had the right to occupy the trust *res* without accounting to any one during his life, the statute of uses executed the use and vested the *cestui que* trust with the legal title. The plaintiff in error was the owner of a life estate in the property, and, hence, the lease executed by the purported trustee did not convey any title to the trust property, and the motion for judgment of non suit should have been granted.

II.

THAT THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN HOLDING AND DECIDING THAT NO ERROR HAD BEEN COMMITTED BY THE TRIAL COURT AS ALLEGED IN THE FOLLOWING SEVENTEENTH ASSIGNMENT OF ERROR:

"17. That the court erred in sustaining the objection of plaintiff to and rejecting the evidence offered by defendant of a deed from Robert Wyllie Davis and wife to John K. Sumner, of an undivided one-half interest in the land known as Mokapu, dated January 1, 1906, and recorded on March 4, 1908, in liber 302, on page 192.

"Plaintiff's objection was that it was incompetent, irrelevant and immaterial, and defendant was estopped from introducing any such deed in evidence."

Before proceeding with the argument under the above specification of error, we will briefly set forth the object of the statute under which the within action was brought.

Section 2750 of the Revised Laws of Hawaii, 1915, under which the defendant in error proceeded against the plaintiff in error, provides as follows:

"Section 2750. Object of Action. Action may be brought in any of the circuit courts by any person against another person, who claims adversely to the plaintiff, an estate or interest in real property, for the purpose of determining such adverse claim."

The first Hawaiian case decided under the above section was *Kahoiwai v. Limeau,* 10 Haw. 507, and the court used the following language:

"The plaintiff by the statute may proceed against any person who claims adversely and *whose claim he desires to have determined.*"

In *T. R. Mossman v. S. B. Dole et al.,* 14 Haw. 365, the following language appears:

"The first section provides that the action may be brought against any one who claims adversely an 'estate or interest * * * for the purpose of determining such adverse claim.' The Supreme Court of California in construing a similar section said: 'It will be noticed that' the section, 'which provides for the determination of adverse claims to realty, is very broad in its terms, and includes all adverse interests, from a claim of title in fee to the smallest leasehold,' citing *Landregan v. Peppin,* 94 Cal. 465, 467."

In *Landregan v. Peppin,* 94 Cal. 465, the case referred to in the above citation, the following appears:

"Section 738 of the Code of Civil Procedure provides 'an action may be brought by any person against another who claims an estate or interest in real property adversely to him, for the purpose of determining such adverse claim.' * * * It will be noticed that Section 738 of the Code of Civil Procedure, which provides for the determination of adverse claims to realty, is very broad in its terms. * * * *The section of the code provides that if the judgment upon the main question, to wit, the adverse claim,* be for the plaintiff, then he may have a writ for the possession of the premises."

In *Castro v. Barry,* 21 Pac. (Cal.) 946, the following language appears:

"The provision of the Code of Civil Procedure is as follows: 'Section 738. An action may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claim.' * * *

"The statutory action to determine an adverse claim is an improvement upon the old bill of peace. The statute enlarges the class of cases in which equi-

table relief could formerly be sought in the quieting of title. It is not necessary as formerly, that the plaintiff should first establish his right by an action at law. He can, immediately upon knowledge of the assertion of such claim, require the nature and character of the adverse estate or interest to be produced, exposed and judicially determined, and the question of title be thus forever quieted. *Curtis v. Sutter,* 15 Cal. 262, 263; *Stark v. Starr,* 6 Wall. 409. Nor is it nesessary that adverse claims should be of any particular character. As said by Baldwin, J., delivering the opinion in *Head v. Fordyee,* 17 Cal. 151, the statute 'does not confine the remedy to the case of an adverse claimant setting up a legal title or even an equitable title; but the act intended to embrace every description of claim whereby the plaintiff might be deprived of the property, or its title clouded, or its value depreciated, or whereby the plaintiff might be incommoded or damnified by the assertions of an outstanding title already held or to grow out of the adverse pretension'."

In *Peterson v. Gibbs,* 147 Cal. 5, the following language appears:

"The mere fact that a defendant in an action brought under the provisions of Section 738 of the Code of Civil Procedure is shown to have some valid interest or estate in the property in controversy, does not warrant the denial of all relief to the plaintiff who has also shown a valid interest therein.

"Such an action is brought, as authorized by the statute, for the purpose of determining any adverse claim that may be asserted therein by a defendant to the land in controversy, and this does not mean that the court is simply to ascertain as against a plaintiff shown to have a legal interest, whether or not such defendant has some interest, *but also that the court shall declare and define the interest held by the defendant, if any, so that the plaintiff may have a*

decree finally adjudicating the extent of his own interest in the property in controversy. * * * Of course if the plaintiff fail to show any legal interest in the property in controversy and as to which he asserts title, he must fail altogether, and could not complain of a judgment of non suit. But where he shows any legal interest, he is entitled to have that interest declared by the court."

It is obvious that under the above authority the duty of the court is to declare the interests of each party in and to the premises the plaintiff claims an interest therein.

In *Pennie v. Hildreth,* 22 Pac. (Cal.) 398, the following language appears:

"The code provides 'an action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim.' Code of Civil Procedure, Section 738. The letter of this section would authorize any person to maintain the action whether he himself, had any interest in the property or not. We are not, however, inclined to give it this broad construction. But it is clearly not necessary that we have title to the property. If he has the right to possession, and another is claiming an estate or interest adverse to such right, he may maintain the action. The language of the code is broad enough to cover every interest or estate in lands of which the law takes cognizance. Citing cases. * * *

"* * * *But the basis of his right to require the adverse interest to be produced and adjudicated is his own interest in or ownership of the land. This is the one thing necessary for him to prove in order to make out his case. If it is denied, a material issue is raised, which casts upon him the burden of*

proving such interest or ownership. Until he does this the defendant is not called upon to produce or prove his claim. Therefore the general denial put in issue a fact necessary to the plaintiff's recovery, and the demurrer to it was improperly sustained. Citing cases. The correctness of the rule that a plaintiff must prove, under a general denial, either that the defendant claims an interest in the land, or that his claim is unfounded, may be a matter of question, but there is no question in our minds that such an answer renders it *absolutely necessary for him to prove his own title or interest in the land, and that, without such proof, he is not entitled to judgment.*

"The question as to the sufficiency of the special answer of the defendant presents a more difficult question. The respondent attacks it on the ground that the same set up that the only interest in the property was by way of a mortgage in the form of a deed, and that there was no offer to redeem shown or tender of the money due, and that such offer to redeem, or tender, was necessary to entitle him to relief in equity or deprive the plaintiff of his right to possession under the deed.

"* * * It is not necessary to the right of a defendant to recover in this kind of action that he should show that the plaintiff has no title or interest in the property. If the plaintiff claims a fee simple he may show that he has nothing more than a lien, or any interest less than he claims, and that he, the defendant, has an interest also, either paramount or subordinate to that of the plaintiff, and the decree of the court should declare the rights of the parties in the property accordingly."

It will be seen that in actions brought under the section under consideration, the main question presented is the determination of the adverse claim of the defendant. It is an elementary rule of statutory

construction that where the terms of a statute which has received judicial construction are used in a later statute, whether passed by the legislature of the same state or country or by that of another, that construction is to be given to the latter statute. *Commonwealth v. Hartnett,* 3 Gray 450; *Rigg v. Wilton,* 13 Ill. 15; *Adams v. Field,* 21 Vt. 256. It is to be presumed in such case that the legislature which passed the later statute knew the judicial construction which had been placed on the former one, and such construction becomes a part of the law. Potter's Dwarris Stat. 274.

It is the contention of the plaintiff in error that the deed of an undivided one-half of the subject matter of the within suit executed by the plaintiff in error, should have been received in evidence as it tended to show that the defendant in error had no title to the subject matter. Since the basis of the plaintiff's right to require the adverse interest of the defendant to be produced and adjudicated is his own interest in the land, any evidence which shows that the plaintiff has no title constitutes a complete defense under Section 2750 of the Revised Laws of Hawaii.

The conveyance made by the plaintiff in error to the assignee therein vested in him all of Davis' right to an undivided one-half of the property under the trust deed. No valid lease of the property could be made by the trustee without the assignee's consent even if the trust was active. It readily follows that

under the theory that the trust was active, assuming that the defendant in error had made out a *prima facie* case against plaintiff in error, the plaintiff in error ought to be able to rebut the *prima facie* case by showing any facts which would tend to defeat the case made out by the defendant in error.

In *Williams v. City of San Pedro,* 94 Pec. (Cal.) 234, the following language appears:

"It is elementary that a plaintiff in an action to quiet title cannot prevail unless he shows title in himself. If he has no title, he cannot complain that some one else, also without title, aserts an interest in the land. *Pennie v. Hildreth,* 81 Cal. 127, 22 Pac. 398; *United Land Ass'n, etc., v. Pac. Imp. Co.,* 139 Cal. 370, 69 Pac. 1064, 72 Pac. 988; *City of San Diego v. Allison,* 46 Cal. 162; *City and County of San Francisco v. Ellis,* 54 Cal. 72; *Winter v. McMillan,* 87 Cal. 256, 25 Pac. 407, 22 Am. St. Rep. 243; *Heney v. Pesolli,* 109 Cal. 58, 41 Pac. 819; *McGrath v. Wallace,* 116 Cal. 551, 48 Pac. 719; *McKenzie v. Budd,* 125 Cal. 602, 58 Pac. 199; *Schroder v. Aden G. M. Co.,* 144 Cal. 630, 78 Pac. 20. *A defendant in such an action may always effectually resist a decree against himself, by showing simply that the plaintiff is without title.* If plaintiff here had simply shown himself to be in possession of the land involved, he would have made a *prima facie* case of ownership, and would have been entitled to judgment in the absence of proof of actual ownership by defendants. He did not do this, but relied solely on the certificate of purchase, as a conveyance by the state to him. This, valid on its face, would have been *prima facie* evidence of ownership it is true, but would have been no more, and defendants necessarily would have had the right to show the facts *aliunde* which rendered it worthless and inoperative as a conveyance, and thus rebut the *prima facie* case of ownership in plaintiff. It being estab-

lished that a patent issued under such circumstances is absolutely void and collaterally assailable in any form of action, this result inevitably follows. Accompanied, as the offer of this evidence by plaintiff was, by the admission of plaintiff of the facts showing the invalidity of the proceedings of plaintiff for the purchase of the land and the certificate of purchase based thereon, all of which defendants would have been entitled to show if the admission had not been made, the trial court did not err in sustaining the objection of defendants to the evidence."

It follows that the evidence offered by the plaintiff in error should have been admitted upon the theory that it tended to rebut the *prima facie* case of ownership made out by the defendant in error.

Could it be argued that the only assignable interest the beneficiary had under the trust was the rents?

We maintain that the assignment of Davis of his undivided one-half interest of the trust *res* to Sumner passed all of Davis' right therein, including his right to use the premises for grazing or agricultural purposes.

39 Cyc. 228 lays down the following rule relative to the interest of a beneficiary under an express trust:

"EXTENT OF ESTATE OR INTEREST OF *CESTUI QUE* TRUST. EXPRESS TRUSTS. (1) IN GENERAL. In determining the extent of the estate or interest of the beneficiary of an express trust the intention of the creator of the trust as ascertained from a consideration of all the provisions of the instrument declaring the trust must be given

effect, if practicable and not contrary to law, and so far as is consistent with the rules of legal construction, for, in the construction of the limitations of a trust, courts of equity follow the rules applicable to legal estates. The *cestui que* trust takes the same estate in duration as though the estate were legal instead of equitable; thus, the *cestui que* trust may take an equitable life estate, or an equitable fee simple. A contingent, as well as a vested, interest may be created by a valid deed of trust; and an estate upon condition may be thus created; and if the condition is a condition precedent the vesting of the estate is dependent upon the performance of the condition, but if it is a condition subsequent the estate vests immediately and the non-performance of the condition renders it liable to be defeated. There are no technical words to distinguish these conditions, and whether they be the one or the other is a matter of construction and depends upon the intention of the party creating the estate. The estate of the beneficiary may be a determinable fee, a fee conditional, or a conditional limitation."

Deeds of trust are construed by the same rules relative to all deeds and conveyances. In determining the nature and terms of the deed of trust, the object is to ascertain the intention of the trustor, just as the terms of any conveyance is determined by the intention of the grantor. It readily follows that the interest of the *cestui que* trust under the trust deed in the case at bar must be determined by the above rule.

What was the intention of the creator of the trust in the present case relative to the estate or interest the beneficiary Davis should have?

An examination of the trust deed discloses that

the trustor intended that, (1) he (trustor) should receive the entire beneficial interest in the trust *res* while the outstanding lease was in existence; (2) after the lease had expired he intended all his interest should pass to Davis. (And here it is well to note the trustor uses the identical words in describing Davis' interest, to wit, "to pay the rents, issues and profits as those from which his interest is determined," which expresses his intention quite clearly, that Davis is to succeed to all his rights, and we do not think any court would dispute the proposition that while the lease was outstanding Sumner (trustor) had the exclusive equitable title to the trust *res.* However, the trustor extends Davis' interest one step further by the use of the language "or, in the discretion of the said Robert Wyllie Davis to permit him to reside upon said premises and while so residing to use the same for grazing and agricultural purposes, etc.," giving him the right of possession coupled with all the profits of the *res.*) (3) Upon the death of Davis his wife was to receive the entire estate; and (4) if Davis' wife was not living, then his heirs at law would be vested with the legal and equitable title.

The instrument as a whole declaring the trust must be considered to ascertain the nature and terms of the trust, and where a conveyance of property is expressly susceptible of conflicting interpretations the one which will carry out the main purpose of the trustor should be adopted.

We maintain that the unquestionable intention of the trustor was to give his nephew Davis the entire beneficial interest in the land in question during the term of his natural life, and that he could either receive the rents, issues and profits or he could use the premises for any lawful purpose.

Is there any other means by which the grantor can show that he intends to bestow upon a grantee the whole beneficial interest in property during the life of the grantee more plainly when, as in the present case, the grantee can either receive the rents, issues and profits of the property, or, if he desires, he can go into the exclusive possession thereof?

Can there be any question as to Davis' interest when, under the terms of the trust, he is clothed with both the equitable title and the right to possession?

In the case of *Young v. Bradley,* 101 U. S. 782, 25 L. Ed. 1044, we find the following:

"The doctrine is well settled that, whatever the language by which the trust estate is vested in the trustee, its nature and duration are governed by the requirements of the trust. If that requires a fee simple estate in the trustee, it will be created, though the language be not apt for that purpose. If the language conveys to the trustee and his heirs forever, while the trust requires a more limited estate, either in quantity or duration, only the latter will vest.

"Mr. Perry, in his work on Trusts, supports, by a very full array of authorities, these two propositions in regard to the construction of instruments out of which trust estates arise: 1—'Whenever a trust is created, a legal estate sufficient for the purposes of

the trust shall, if possible, be implied in the trustee, whatever may be the limitations in the instrument, whether to him and his heirs or not.' 2—'Although a legal estate may be limited to a trustee to the fullest extent, as to him and his heirs, yet it shall not be carried further than the complete execution of the trust necessarily requires.' Perry on Trusts, Sect. 312. Again he says, 'In the United States the distinction between deeds and wills in respect to the trustee's estate has not been kept up; and the general rule is that whether words of inheritance in the trustee are, or are not, in the deed, the trustee will take an estate adequate in the execution of the trust, and no more nor less.' Sect. 320."

Suppose in the present case the trustor simply used the language "to pay the rents, issues and profits to Davis during the term of his natural life," without adding the discretionary clause. Under the above assumption, if Davis desired to occupy the land instead of receiving the rents, could the trustee claim Davis would not be entitled to such right under the trust? Just as long as Davis was receiving the exclusive interest in the trust *res* the intention of the trustor would be carried out and the trustee would be doing his duty under the trust. We do not contend that a beneficiary would in every case be entitled to the possession of the property, for the very nature of the property would not permit such a right in some cases. Where, however, the property is similar to that in the case at bar, the trustee in permitting the beneficiary to occupy the land would not be committing a breach of trust, nor would it be said the intention of the trustor was defeated if he

permitted the beneficiary to occupy the trust *res.* By the use of the terms "rents," "issues" and "profits" the entire beneficial interest is intended.

In 28 Am. & Eng. Enc. of Law, 2nd Ed., page 106, we find the following:

"Since the *cestui que* trust is the beneficial owner of the trust property, he is generally entitled to the possession thereof for the purpose of the enjoyment of his beneficial ownership, unless the duties imposed on the trustee require him to retain the possession, or there is otherwise manifested in the trust instrument an intent that the *cestui que* trust should not have the possession.

"Thus the general rule is that when real estate is conveyed or devised to a trustee to pay the rents and profits to the *cestui que* trust, the *cestui que* trust is entitled to the possession, even though there are charges on the property. * * * The *cestui que's* equitable interest may be mortgaged, unless the terms of the deed of trust expressly or impliedly provide otherwise.

"The *cestui que's* equitable interest may be assigned, even though it may be defeated by a contingency. But in such a case the assignee takes subject to the contingency."

Assuming that the trust under the deed under consideration was active, would Davis have an assignable interest, and did his right to use the premises for grazing and agricultural purposes pass to the assignee Sumner?

Pomeroy's Eq. Juris., Vol. 3, page 992, contains the following:

"CLASSES OF ACTIVE TRUSTS. -- Although active trusts may be created for a great number of special purposes, those which are the most frequent and important may be reduced to the four following generic classes: 1. Where the trust is simply to convey the property to some designated person, or class of persons. 2. Where the primary object is to sell or dispose of the entire trust property in some manner and to use the proceeds for some ulterior purposes. In all instances of this class, where the trust is to sell corpus of the property and to distribute the proceeds among creditors, legatees and the like, the beneficiaries plainly acquire no proper estate in the original trust fund prior to its sale; their right and interest attach to the proceeds of this fund, which are to be paid to or distributed among them. In order to make their right fully available, and to guard their interest as much as possible against the large authority given to the trustees, equity has invented in such cases the doctrine of conversion by which real property is regarded as personal, and personal property as real. 3. This class includes all those trusts where the primary object is to hold and invest the entire property and its proceeds, and thus to accumulate for some ulterior purposes. 4. *This class includes all those trusts of which the primary object is to hold the corpus of the property, receive its rents, profits and income, and apply them to some prescribed uses. More than one of these four general objects may be embraced in the same trust. In instances of the third and fourth classes, the beneficiaries may have direct equitable interest in the trust property itself, which is plainly more than a mere right of action, but is not so substantial an estate as that held by the* cestui que *trust under a simple passive trust.*"

Speaking of the fourth class above mentioned, the following note on page 993 appears:

"The forms of this class also are various. Real or personal property, or both, is sometimes given by will upon trust to hold the capital and apply the income to the payment of debts, legacies, annuities, etc.; property, real or personal, or both, is given by will or by deed in trust to receive the rents and profits and pay the same to or apply them to the use of designated beneficiaries during their lives, or for some specified period. In this manner provision is often made for wives in marriage settlements, and for widows and children by will."

Davis being the equitable owner, could he alienate his rights in the trust *res*?

The Supreme Court of the United States in the case of *Croxall's Lessor v. Shenerd,* 5 Wall. 268, 18 L. Ed. 572, speaking of a *cestui que's* interest, lays down the following proposition:

"In the consideration of a court of equity the *cestui que* trust is actually seized of the freehold. He may alienate it; and any legal conveyance by him will have the same operation in equity upon the trust as it would have had at law upon the legal estate.

"The trust, like the legal estate, is descendable, devisable, alienable and barrable by the act of the parties and by matters of record. Generally, whatever is true at law of the legal estate is true in equity of the trust estate."

We do not think that Davis' right to assign his interest under the deed in consideration can be questioned, especially under the law as laid down in the above authority. We think the following authorities will bear out the last statement:

In *Nichols v. Levy,* 5 Wall. 433, 18 L. Ed. 598, Mr. Justice Swayne says:

"It is a settled rule of law that the beneficial interest of the *cestui que* trust, *whatever it may be,* is liable for the payments of his debts. It cannot be so fenced about by inhibitions and restrictions as to secure to it the inconsistent characteristics of right and enjoyment to the beneficiary and immunity from his creditors. A condition precedent that the provision shall not vest until his debts are paid, and a condition subsequent that it shall be divested and forfeited by his insolvency with a limitation over to another person, are valid and the law will give them full effect. Beyond this protection from the claims of creditors it is not allowed to go."

Surely, if Davis' interest is liable for the payment of his debts, it is assignable.

In *Nichols v. Eaton,* 91 U. S. 717, 23 L. Ed. 254, the following doctrine is laid down:

"The claim of the assignee is founded on the proposition, ably presented here by counsel, that a will which expresses a purpose to vest in a devisee either personal property, or the income of personal or real property, and secure to him its enjoyment free from liability for his debts, is void on grounds of public policy as being in fraud of the rights of creditors, or as expressed by Lord Eldon in *Brandon v. Robinson,* 18 Ves. 433: 'If property is given to a man for his life, the donor cannot take away the incidents of a life estate.'

"There are two propositions to be considered as arising on the face of this will as applicable to the facts stated: 1. Does the true construction of the will bring it within that class of cases, the provisions of which on this point are void under the principle above stated; and, 2. If so, is that principle to be the guide of a court of the United States sitting in chancery?

"Taking for our guide the cases decided in the English courts, the doctrine of the case of *Brandon v. Robinson* seems to be pretty well established. It is equally well settled that a devise of the income of property, to cease on insolvency or bankruptcy of the devisee, is good, and that the limitation is valid. *Dommett v. Bedford,* 3 Ves. 149; *Brandon v. Robinson,* 18 Ves. 429; *Rockford v. Hackman,* 9 Hare 475; *Lewin, Tr.,* 80, Ch. VII, Sect. 2; *Tillinghast v. Bradford,* 5 R. I. 205.

"If there had been no further provision in regard to the matter in this will than that on the bankruptcy or insolvency of the devisee, the trust as to him should cease and determine; or, if there had been a simple provision that, in such event, that part of the income of the estate should go to some specific person other than the bankrupt, there would be no difficulty in the case. But the first trust declared after the bankruptcy for this part of the income is in favor of the wife, child or children of such bankrupt; and in such manner as such trustees in their discretion shall think proper."

In *Sears v. Chate,* 146 Mass. 395, 4 Am. St. Rep. 322, the court says:

"This court has held that a founder of a trust may give an equitable life tenant a qualified estate in income which he cannot alienate and which his creditors cannot reach. *Broadway National Bank v. Adams,* 133 Mass. 170, 43 Am. Rep. 504. *But in order to give such a qualified estate instead of an absolute one, the language of the founder must be clear and unequivocal to that effect.* Taking this will as it is, we should not be justified in holding that the plaintiff took anything less than an absolute equitable estate both in the income and in the corpus of the trust."

Maynard v. Cleaves, 149 Mass. 307, contains the following language:

"It is settled in this commonwealth that a testator who makes a gift of income to a beneficiary may provide that it shall not be alienable in advance by him or be subject to be taken by his creditors. *But in order to give such a qualified estate instead of an absolute one, the language of the testator must be such as clearly to import an intention to do so."*

Kessner v. Phillips, 189 Mo. 515, 88 S. W. 66, 107 Am. St. Rep. 374:

"'On the other hand, where the cestui que *trust has an absolute right to the fund or its avails, such as a right to occupy the land and to receive the income therefrom,* * * * or where it is his absolute property and may therefore be alienated by him,' or, where the land is conveyed upon a simple condition that it shall not be subject to the grantee's debts, no spendthrift trust arises or is created, and the donee's interest may be sold under execution or sequestrated in equity. 26 Am. & Eng. Enc. of Law, 2nd Ed., 144; 1 Jones on Real Property, Sect. 663; Gray's Restraints on Alienation, Sect. 259; *Potter v. Merrill,* 143 Mass. 190, 9 N. E. 572; *Maynard v. Cleaves,* 149 Mass. 307, 21 N. E. 76; *Smeltzer v. Gozlee,* 172 Pa. St. 298, 34 Atl. 44; *Young v. Easley,* 94 Va. 193, 26 S. E. 401."

Perry on Trusts, Vol. II, Sect. 287a:

"At common law, a man cannot attach to a grant of property or estate otherwise absolute, the condition that it shall not be alienated, and in England, Rhode Island, South Carolina and North Carolina, the same rule is adopted as to equitable estates for life; but in Pennsylvania, Vermont and Massachusetts, the founder may provide that the income shall

not be alienated by anticipation, nor subject to be taken for debts until paid over to the *cestui.* It is not possible, however, for a man to create a trust to pay the income to himself for life with a provision against alienation by anticipation so as to prevent his creditors from coming at the income by a bill in equity. A *cestui* having a vested equitable interest, though contingent, may convey it subject to the contingency."

Whipple v. Fairchild, 139 Mass. 264:

"The only question presented by this report is whether Silas Fairchild took under the Deed of Trust of his father to Hawks, any estate which was assignable by him during the life of his father.

"By this deed, the Merry Place, so called, is conveyed to Hawks upon the following trusts: 1. To allow the grantor to occupy the premises and to receive the rents and profits. 2. To join with the grantor in such conveyances as he should make if the trustee in his discretion should deem it expedient. 3. After the death of the said grantor, or at any time before his death, if the said trustee should be thereto requested by all the children then living and the wife of the grantor, the said trustee was to convey said property, in the former case, to the heirs of the said grantor, and in the latter case to the grantor or to such person or persons as he should nominate.

"The grantor did not convey during his life and the case presented is in substance one upon conveyance upon the trusts that the grantor shall have the use of the property during his life with a qualified power of appointment, and that at his death it shall be conveyed to his heirs.

"We are of the opinion that each of the children of the grantor took under the deed an equitable interest which, although it might be defeated by the contingency either of his death before the father or of the father's conveying under the power, was assignable by him subject to such contingency.

"In *Putnam v. Story,* 132 Mass. 205, a fund was bequeathed upon the trusts to pay the income to the daughter of the testator during her life, and at her death the capital sum to be divided among the heirs of the said daughter share and share alike. It was held that the children of the daughter took vested interests which they could assign during the life of their mother.

"The only material difference between that case and this is, that in the case at bar the life tenant had a conditional power of appointment. The vesting of their interests in possession might have been defeated by the exercise of that power; but we do not see how the existence of the power affected the nature of the estate of the children, except that it rendered it defeasible. As the power was not executed, their estate has not been defeated, but took effect *secundum formon doni,* as if the power had not existed. *Moore v. Wenker,* 16 Gray 305.

"We are therefore of the opinion that the deed of Silas Fairchild, son of the grantor—(and it was admitted that assignment was made during grantor's life)—to Frazier *conveyed the equitable interest in the Merry Place which the grantor at the time it was given had under the deed of trust;* and it follows that the plaintiff is entitled to a conveyance of an undivided sixteenth part of it subject to any charges which the trustee has against the estate."

Smith v. Towers, 69 Md. 77:

"In England, the decisions are all one way, and it is well settled there, that the devise of an *equitable estate or interest for life* to any person, other than a married woman, carries with it, as a necessary incident to such estate, or interest, the right of alienation by the *cestui que* trust, and is liable for the payment of his debts, and no provision by way of inhibition or otherwise, which does not operate as cessor or limitation over of the estate, can protect it against

the claims of creditors: *Brandon v. Robinson,* 18 Ves. 429; *Rochford v. Hackman,* 9 Hare 480; *Graves v. Dolphin,* 1 Sim. 66; *Green v. Spicer,* 1 Russ. & M. 395; *Younghusband v. Gisborne,* 1 Coll. C. C. 400.

"In this country, however, the decisions are conflicting, and the supreme court of the United States, and the supreme courts of other states have, after full consideration of the English cases, held that the power of alienation is not a necessary incident to an equitable estate for life, and that the owner of property may, in the free exercise of his bounty, so dispose of it as to secure its enjoyment to his beneficiary, without making it alienable by him, or liable in any manner for his debts, and that such an intention, *when clearly expressed by the founder of the trust, must be respected by the courts.* The supreme court, after reviewing the English decisions, in an able opinion by Justice Miller, says: 'But the doctrine that the owner of property, in the free exercise of his will in disposing of it, cannot so dispose of it but that the object of his bounty, who parts with nothing in return, must hold it subject to the debts due his creditors, though that may soon deprive him of all the benefit sought to be conferred by the testator's affection or generosity, is one which we are not prepared to announce as the doctrine of this court. * * * Nor do we see any reason, in recognized nature and tenure of property and its transfer by will, why a testator who gives, without any pecuniary return, who gets nothing of property value from the donee, may not attach to that gift the incident of continued use, of uninterrupted benefit of the gift, during the life of the donee.' *Nichols v. Eaton,* 91 U. S. 725, 727.

"And in the still later case of *Broadway National Bank v. Adams,* 133 Mass. 170, argued in June, 1881, and reargued in March, 1882, the court unanimously held that property may be conveyed in trust, *with the provision that the income shall not be alienated by the beneficiary by anticipation, or be subject to*

be taken by his creditors in advance of its payment to him, although there is no cessor or limitation over of the estate in such an event. Morton, C. J., says: 'We are not able to see that it would violate any principles of sound public policy to permit a testator to give to the object of his bounty such a qualified interest in the income of a trust fund, and thus provide against the improvidence or misfortune of the beneficiary. * * * Under our system, creditors may reach all the property of the debtor not exempt by law, but they cannot enlarge the gift of the founder of a trust, and take more than he has given.'

"And then, again, in *Rife v. Geyer,* 59 P. St. 393, Judge Sharswood, speaking for the court says: 'That a benefactor has the power of thus restricting the enjoyment of his bounty through the medium of a trust during the life of the beneficiary is now the unquestionable law of this state.' In *Shankland's Appeal,* 47 Id. 113, the point was expressly decided, and it was there held that a trust to collect and receive rents and pay over the same to a son of the testatrix for and during the term of his natural life, *without being subject to his debts and liabilities,* was an active one, and that the legal estate was vested in the trustee, and no act of the *cestui que* trust could deprive him of it, or allow him to interfere with the collection of the income, and no creditor could touch the income or any interest which the *cestui que* trust had in it.

"In Vermont, Connecticut and Kentucky, the highest courts have held that the income of property may be devised in trust for the benefit of the *cestui que* trust for life to the exclusion of the claims of his creditors: *Executors of White v. White,* 30 Vt. 338; *Leavitt v. Bierne,* 21 Conn. 1; *Pope's Ex'rs v. Elliott,* 8 B. Mon. 56.

"In other states, however, and it may be said in the majority of the states where the question has arisen, the English doctrine has been adopted with-

out qualification: *Tillinghast v. Bradford,* 5 R. I. 205; *Dick v. Pitchford,* 1 Dec. & B. Eq. 480; *Heath v. Bishop,* 4 Rich. Eq. 46; *Bailie v. McWhorter,* 56 Ga. 183; *Rugely and Harrison v. Robinson,* 10 Ala. 702."

Under the foregoing authorities, all doubts, if any may be said to have existed upon the question of Davis' right to assign his interest under the deed, are at an end. The trust deed will be searched in vain to find any expression of the trustor whereby an intention to secure the trust *res* from Davis' creditors or prohibit him from assignnig his interest can be found. On the contrary, the only restriction the trustor intended was relative to the time of enjoyment. The trustor intended that Davis was to receive the whole beneficial interest for the period of his natural life, and whether he received the beneficial interest by way of sale or mortgage of his estate or resided upon the trust property was wholly within his discretion. As far as the trustor was concerned, either of the foregoing could not be said to affect or be contra to his intention. All Davis could assign or sell was his life interest and upon his death the property would descend in accordance with the trustor's intention, namely, to Davis' heirs at law as provided in the deed.

The authorities cited show that the English courts seem to treat the right of alienation and liability for debts as inseparable incidents of the life estate whether limited by trust or otherwise. The only exception is where by the terms of the trust the estate reverts upon crtain contingencies which are nowhere

to be found in the trust under consideration. It must be observed in the case at bar that *no discretion* whatever is placed in the trustee. We maintain that the exclusion of the right of alienation and liability for debts can only be affected, if at all, *by the use of very clear and explicit terms, and such restriction cannot be implied from any dubious expressions but must be deducible from words that admit of no doubt whatever.*

It is also clear under the authorities cited that the American rule is not as strict as the English, and a majority of the states permit a restriction from alienation where, as said above, it is plainly deducible from the trust deed that the intention of the trustor was to restrict it.

Assuming that the only right Davis had under the trust deed was contained in the language "to permit him to reside upon the said premises and while so residing to use the same for grazing or agricultural purposes," could it be said that he simply had a mere personal license which he could not assign?

4 Cyc., page 14, contains the following:

"PARTICULAR RIGHTS AND INTERESTS. REAL ESTATE. *Any estate or interest* in lands may be assigned, and this is so whether the estate be legal or equitable, vested or contingent. Mere personal licenses to use land are, however, not assignable. *But grants or reservations in deeds of the right of entering the land and taking therefrom the products of the soil or the mineral underlying it, confer not merely personal licenses but such interest in the land as are capable of assignment.*"

We do not think even counsel for the defendant in error will dispute the fact that Davis has the right to use the premises for life as long as he used them for grazing or agricultural purposes. If a right to use land is given by deed to a person for life, provided he uses the same for grazing and agricultural purposes, does he possess any interest in the land? Ordinarily, a grant to A. for life, provided he use the granted premises for grazing or agricultural purposes, would be an estate upon condition subsequent, and, surely, if Davis could be said to own an estate upon condition subsequent, he must have had some interest in the trust *res,* and if it be designated a condition subsequent, could there be any question whether he could alienate it? We do not maintain that Davis' interest would simply be an estate upon condition subsequent under the assumed facts, it would be a greater interest, for in the case of condition broken in an estate upon condition subsequent, the title reverts to the donor, while in the present case, assuming Davis could only use the land for grazing and agricultural purposes, if he committed a breach of the condition he would still be entitled to the proceeds of the property, and upon making known his request to the trustee, he could subsequently use the premises for grazing again. Surely, it cannot be contended that if Davis could be said to have a greater estate than one upon condition subsequent he could not assign it.

If Davis could not be said to have possessed any

estate in the trust property, did he have an easement or a license, assuming that the trust deed simply contained the expression "to permit him to reside upon the land and while so residing to use the same for grazing or agricultural purposes during the term of his natural life?"

14 Cyc. 1144:

"An easement is a liberty, privilege or advantage in land without profit, existing distinctly from the ownership of the land, and because it is a permanent interest in the land of another, with the right to enter at all times, and enjoy it, it must be founded upon a *grant by writing* or upon prescription which presupposes a grant; but the license is an authority to do a particular act or series of acts upon the land of another, *without possessing any estate therein.* A license is founded on personal confidence and is not assignable and *requires no writing,* as it is not within the statute of frauds, and *is revokable at will,* while the grant of an easement is within the statute of frauds and must be in writing."

Licenses are sometimes misconstrued as easements, but, inasmuch as a license is a personal, and nearly always, a revocable privilege to do something upon the land of another without possessing any property or interest in it, whereas an easement always has reference to an interest in land, we hardly see room for the confusion of the terms.

From the above authority it would plainly appear that Davis had an easement in the land. The fact that a license is revocable at the will of grantor leaves the question of license out of the present case.

After the expiration of the outstanding lease, all the grantor's right, title and interest passed to the grantee thereunder, and having parted with all his right, he possessed no power to revoke any easement or rights conferred in the deed.

In *Fuhr v. Dean,* 26 Mo. 116, 67 Am. Dec. 487, the court, speaking of subject of license, uses the following language:

"Though it is difficult often to determine between an easement and a license, it seems to be settled that *the right to enter and remain on another's land for a certain time, or indefinitely, at the pleasure of the party claiming the privilege, is an interest in the land which can only be created by deed.*"

Counsel for defendant in error will concede that Davis had the right to enter and remain in possession of Mokapu for life at his pleasure, and that the interest was created by deed, and, as the above authority says, it is settled that such right is an interest in land, why carry our case any further? Being an interest in land, it was assignable.

The case of *Mumford v. Whitney,* 15 Wend. 392, 30 Am. Dec. 60, after reviewing the authorities on licenses, lays down the following decision which seems to be followed:

"Much of the discrepancy may have arisen from the different ideas attached to the word 'license.' If we understand it, as Chancellor Kent defines it, it seems to me there can be no difficulty. It is an authority to do a particular act upon another's land; is founded in personal confidence and is not assign-

able. For example, A. agrees with B. that B. may hunt or fish on A.'s land. A. thereby gives B. a license for that purpose. This gives B. no interest in the land; he cannot authorize any other person to go upon the land; it is a personal privilege granted to B. alone. If, after A. has given his consent, and before B. has entered upon his land, A. changes his mind, he has a right to do so and forbid B. from entering upon his land for the specified purpose. The license is thus far executory and may be revoked at pleasure. If B. afterwards enters, he is a trespasser. If, however, B. enters before any revocation of the license, the license is then executed, and it is not comptent for A. to revoke it and make B. a trespasser. This doctrine is applicable *only to the temporary occupation of land and confers no right or interest in the land.*"

Applying this reasoning to the case at bar, it is plainly seen that Davis' rights under the trust deed were much greater than a mere license. If a license is executory while not being exercised, the question arises in the present case, at what time was Davis' right to use the premises for grazing and agricultural purposes executory? The moment Davis' rights under the deed in the present case sprung up, the grantor ceased, and he could neither grant nor revoke any rights after he executed the deed of trust, nor could he exercise any dominion over the property therein.

14 Cyc. 1140 defines an appurtenant easement as follows:

"Easements appurtenant inhere in the land, concern the premises, and are necessary to the enjoyment thereof. Such easements are incapable of

existence separate and apart from the particular messuage or land to which they are annexed, there being nothing for them to act upon. They are in the nature of covenants running with the land, attach to the land, to which they are appurtenant, and pass by a deed of conveyance."

14 Cyc. 1140 defines an easement in gross as follows:

"EASEMENTS IN GROSS—1. IN GENERAL. It has been contended that there can be no such thing according to the common law or the civil law as an easement in gross. But there is a class of rights which one may have in another's land without their being exercised in connection with the occupancy of other lands, and they are therefore called rights or easements in gross. In such cases the burden rests upon one piece of land in favor of a person or an individual; the principal distinction between an easement proper (the class of easements considered in the preceding section) and a right in gross is found in the fact that in the first there is and in the second there is not a dominant tenement. Furthermore, unlike easements appurtenant, an easement in gross cannot ordinarily be assigned or transmitted by descent, nor can the owner of the right take another person into company with him. Thus a right of way which has neither of its termini on the premises of the owner and is not appurtenant to any estate, is called a right of way in gross. It is a mere personal right and is neither assignable nor inheritable, nor can it be made so by any terms in the grant. But there are cases where it was the manifest intention of the parties to create an assignable interest, and in such cases the courts have given effect to that intention."

Easements of the last named are the only kind which cannot be alienated or assigned. It is well to

note that an easement in gross is distinguished from one appurtenant to the land in this way, that in the easement in gross there is no dominant tenement. It is plainly a personal right contradistinguished from a property right.

In *Willoughby v. Lawrence,* 116 Ill. 11, 56 Am. Rep. 763, the language is as follows:

"The general rule is that two distinct tenements are necessary to the creation of an easement, the dominant, to which the right belongs, and the servient, upon which the obligation rests, as, if the owner of one farm has a right of way over the adjoining farm, that in favor of which the right is exercised is the dominant tenement, and that over which it is exercised is the servient tenement. *Washburn, Easem.,* 3 et seq.; *Garrison v. Rudd,* 19 Ill. 550.

"In easements of this character the burden rests upon one piece of land in favor of another piece of land. But there is a class of rights which one may have in another's land without their being exercised in connection with the occupancy of other lands, and therefore called rights in gross. In such cases the burden rests upon one piece of land in favor of a person or individual. The principal distinction between an easement and a right of way in gross is found in the fact that in the first there is, and in the second there is not, a dominant tenement. The right of way is in gross and personal to the grantee because *it is not appurtenant to other premises.* The owner of the premises may grant the right of way in either form."

Chancellor Kent says an easement in gross is a mere personal interest in the real estate of another not assignable and not inheritable. It dies with the person and is so exclusively personal that the owner

of the right cannot take another person in company with him.

In *Cadwalader v. Bailey,* 17 R. I. 495, 14 L. R. A. 300, it is said:

"Whether an easement in a given case is appurtenant or in gross is to be determined mainly by the nature of the right and the intention of the parties creating it. *If it be in its nature an appropriate and useful adjunct of the land conveyed, having in view the intention of the grantee as to its use, and there being nothing to show that the parties intended it to be a mere personal right, it should be held to be an easement appurtenant to the land and not an easement in gross, the rule for the construction of such grants being more favorable to the former than to the latter class.*"

Can there be any doubt that the right to use the premises for grazing is an appropriate and useful adjunct of the land in the trust deed, and is there any doubt as to who the trustor had in mind when the deed was executed? Could it be said, however, that assuming that Davis only possessed the right to use the land for grazing and agricultural purposes, that his interest could not be said to be at least an appurtenant easement?

There remains another class of rights which are called profits a prendre. These are defined in 14 Cyc. 1142, as follows:

"The right to profits, denominated profits a prendre, consists of a right to take a part of the soil or produce of the land in which there is a supposable value. The right to enter upon the land of another

for any of the following purposes has been held to be a profit a prendre; to cut grass, to *depasture the land,* to shoot over the land and take game or wild fowl, to fish in an unnavigable stream, to take away drifting sand from the beach, or seaweed thrown upon the shore, to take iron ore from the land, to mine metals generally, to search for and dig coal, and to take timber from the land. Running water, whether above or below the surface, is not a product of the soil. * * *

"Where this right is appurtenant to an easement, it cannot be severed and assigned separately. But if the right be granted to one in gross it is treated as an estate or interest in land which may be assignable or inheritable if granted in fee."

Tuncum Fishing Co. v. Carter, 100 Am. Dec. 602, 61 Pa. St. 21:

"The distinction seems to be this: If the easement consists in a right of profits a prendre, such as taking soil, gravel, minerals, and the like, from another's land, it is so far of the character of an estate or interest in the land itself that if granted to one in gross it is treated as an estate and may therefore be for life or inheritance. But if it is an easement proper, such as a right of way, and the like, and is granted in gross, it is a mere personal interest and not inheritable."

In *Cadwalader v. Bailey,* 14 L. R. A. 300, the Supreme Court of Rhode Island lays down the following doctrine:

"We think the greater weight of the authorities supports the doctrine announced, that easements in gross properly so called, are not assignable or inheritable. If, however, a right to take soil, gravel, minerals, water from a spring, and the like, from

another's land may properly be denominated an 'easment,' then it is proper to say that an easement in gross—for such it might doubtless be constituted —might be both assignable and inheritable, for the rights enumerated are so far of the character of an estate or interest in the land itself, that if granted to one in gross it is treated as an estate and may therefore be one for life or inheritance."

Tiffany on Real Property, Vol. 1, page 743, speaking of the right of pasture, proceeds:

"The most important of the rights of profit aprendre, historically considered, is the right to pasture cattle on another's land, generally referred to as common of pasture. Under the feudal system the right existed in favor of the tenants of the manor as regards the waste land of the manor—that is, the land not allotted to tenants or reserved by the lord as demesne land.

"Common of pasture involves the placing of the cattle on the land to eat the herbage, in this differing from a right to take herbage from another's land by cutting and transporting it."

It is readily seen that if the trust deed in the present case simply conveyed the right to use the land for grazing and agricultural purposes, Davis would have an interest in the land which would be capable of assignment. Surely the right to use the land for grazing being an *incorporal hereditament* it was an interest in land and could be conveyed just the same as any other interest. When the fact that the deed under consideration is one of trust and the beneficiary is to receive the rents, issues and profits, is taken into consideration, how could it be said that

his right to reside upon the land and use it for grazing, etc., was a personal right? If Davis had the right to assign the rents, issues and profits of the land (and we understand counsel for defendant in error will concede this), why construe the deed in such a manner as would prohibit his right to use the premises from being assignable. Surely if the trustor intended he should have the right to assign one, is it not consistent to assume he could do likewise with the other? We maintain that the right to receive the rents, issues and profits would convey the right to possession under the trust deed, and that when Davis assigned his one-half, the right to possession also passed. It is worthy to note that Davis is the only person who could convey the last mentioned, and any conveyance of his interest in the *res* would include all of his rights.

We are of the opinion that the trustor intended that Davis should have the exclusive beneficial interest of the trust *res* during his natural life. The fact that the beneficiary could use the land for the term of his natural life alone, conveyed a life estate to him. The law is well settled that a devise of the use of the land is equivalent to the devise of the land itself, and carries the legal as well as the beneficial interest therein.

The following citations bear out all contentions advanced by the plaintiff in error. In the following cases where the trust was held active, an essignment

by the beneficiary of his equitable interest was upheld.

In *Henson v. Wright,* 12 S. W. (Tenn.) 1035, Justice Lurton lays down the following:

"Andrew Hamilton, in 1864, for love and affection, conveyed by deed certain lands to James Henson, 'in trust, to hold said two tracts to the only proper use and benefit of my young friend, William A. Hamilton, who is now a scholar at the school of E. L. Crocker, in Davidson County, in the state of Tennessee. He is to hold said land for the benefit of the said William only, and to account to him or his guardian for the rents or yearly issues of said land. He is to hold said two tracts for the only proper use and benefit of him, the said William A. Hamilton, for and during the term of his natural life. At the death of said William A. Hamilton, leaving children or the descendants of children, he is to convey said lands to the children, to be held by them as tenants in common, the descendants to represent their ancestor. If the said William A. Hamilton should die in my life time, leaving no children, or the descendants of such, said trustee is to convey said land to me. If said William A. Hamilton should die after I do, and leave no children, or the descendants, then said trustee is to convey said land to my heirs, whoever they may be.' In 1885 the trustee and the beneficiary joined in the execution of a mortgage upon the estate for life of the beneficiary in the lands so conveyed in trust to Henson. They now unite in this bill, for the purpose of restraining a sale of the supposed life-estate and to have the mortgage declared null and void, as having been executed without power in the beneficiary or his trustee. A demurrer was sustained, and the bill dismissed.

"The first contention of defendants is 'that the conveyance from A. Hamilton to Henson, trustee, was a dry, naked trust, and the beneficiary took a

life estate in the property.' This is unsound. The duty to take, hold and convey the remainder, upon the death of the beneficiary for life, to persons who should then appear entitled under the provisions of the deed, makes the trust an active one. That the founder of the trust could, by way of executory devise, have disposed of the remainder, will not affect the character of the trust if he chose to resort to a trustee in preference. *Akin v. Smith,* 1 Sneed 309; *Hoobery v. Harding,* 10 Lea 398. If any trust or duty is imposed upon the trustee, either expressly or by implication, the trust is an active one; and in such case there is no merger of the legal and equitable estates, and the interest of the beneficiary not being a legal one, is not subject to levy by execution. *Henderson v. Hill,* 9 Lea 25; *Jourolmon v. Massengill,* 2 Pickle 93; 5 S. W. Rep. 719. The rule that a devise of the rents and profits of land is equivalent to a devise of the land itself only applies where no active trust is interposed. In *David v. Williams,* 1 Pickle 646, 4 S. W. Rep. 8, the devise of the rents and profits to the children of the devisor did not operate to devise them a legal estate for life in the lands, and this for the reason that an active trust was interposed between the legal and equitable estates. The trust in that case was held to be an active one, because it was the duty of the trustee to first apply the rents and profits to payment of taxes, and to keeping the property in repair and tenantable condition. The duty was peculiarly important, in view of the fact that upon the death of the children the rents and profits went to the grandchildren, and this trust not only preserved the remainder devised to the grandchildren, but preserved it in repair and tenantable condition. The duty of applying rents to repairs, or a trust to preserve contingent remainders, makes the trust an active one. Perry Trusts, Sect. 305. In the Davis case the trust ceased upon the death of the children, and the estate of the trustee was therefore cut down to an estate for life

of the children upon the doctrine that the trustee will take no greater estate than the objects of the trust require. The rents, being upon the death of the children, devised to the grandchildren, without any limitations, and the trust being no longer an active one, it was held to be equivalent to a devise of the remainder in fee. 1 Pickle 647, 4 S. W. Rep. 8. The trust in the case at bar was an active one and the legal estate did not pass to the beneficial owner. The interest of the beneficiary, Hamilton, was not such an one as could have been reached by a creditor through the instrumentality of a court of chancery. By Sections 4282-4285, Code Tenn., the court of chancery is given jurisdiction to subject to the satisfaction of the creditor choses in action, stocks and property held in trust for the debtor, 'except when the trust has been created by, or the property so held has proceeded from, some person other than the defendant himself, and the trust is declared by will, duly recorded, or deed, duly registered.' This legislative provision operated to deprive the chancery court of any jurisdiction which it might have otherwise had to subject the interest of a beneficiary under such a trust as that described. *Jourolmon v. Massengill,* 2 Pickle 121, 5 S. W. Rep. 719.

"But does it follow that, because the interest is such an one as cannot be reached by execution at law, or by bill in equity, that therefore it is inalienable? The trust is distinguished from the one in favor of Massengale in that all power of alienation was expressly withheld from the beneficiary, Massengale, and in that the income was expressly appointed to be used alone in the support of the *cestui que* trust. That trust was distinctly a spendthrift trust, and is so treated throughout the opinion. But learned counsel endeavored to bring this trust within the principles of the Messengale case *by the contention that this trust is founded for a special use and purpose, the education and personal support of the beneficiary, and that the power of alienation is*

therefore repugnant to the purposes of the founder, and, by necessary implication, withheld.

"The words relied upon as constituting this a trust for the personal support and maintenance of the beneficiary are these: 'for the only proper use and benefit of my young friend, William A. Hamilton.' And, again, that the trustee 'is to hold said lands for the benefit of said William A. Hamilton only, and to account to him or his guardian for the rents or yearly issues of said land'; and that 'he is to hold said two tracts for the only proper use and benefit of him, the said William A. Hamilton, for and during his natural life.' These words do not limit the interest of the *cestui que* trust to his support and maintenance, or declare the object of the trust to be to make a provision for his support. They only operate to declare a distinct trust for the sole and only benefit of William Hamilton during his life. A trust may be so created that no interest rests in the beneficiary, as where it is limited to the support and maintenance of the beneficiary, and he is prohibited from alienation or anticipation. So where the increase is to be paid over only in the discretion of the trustee, or when it can only be applied for a special use, such as education or support. In all such cases the purpose of the trust would obviously be defeated if the beneficiary could assign or alienate. *But wherever the absolute, equitable interest is in the* cestui que *trust and there is no prohibition upon his power of alienation, the incidents of ownership attach, and such interest is assignable and alienable.* Perry, Trusts, Sec. 386a.

"It is difficult to see how this trust would be breached by an assignment by the beneficiary, upon sufficient consideration, of the rents accrued or to accrue in the hands of his trustee. These rents would in such case have been applied to 'the only use and benefit' of the beneficiary, just as certainly as if paid into his hands. The late cases, to which we have been referred, of *Lampert v. Haydel,* 96 Mo.

439, 9 S. W. Rep. 780, and *Smith v. Towers,* 69 Md. 77; 14 Atl. Rep. 497, and 15 Atl. Rep. 92, are not in point. In the first case the devise was 'for the use and benefit of my three sons, * * * in equal shares, as long as they all may live, with power * * * to use and enjoy equally the rents, issues and profits thereof during their natural life. * * * My object in making the foregoing disposition of my St. Louis property, and in attaching the limitations aforesaid, is to secure to my children a certain annual income, beyond the accidents of fortune, * * * and, with this end in view, to take away from them the power of disposing of the same, or of creating any liens thereon, or of making the same liable in any way for their debts.' This last clause operated to declare the trust to be one for the personal support of the beneficiaries and in express terms withheld all power of charging the trust by mortgage or assignment. The deed of one of the beneficiaries, by which he alienated his interest in the trust, was therefore properly held inoperative and void. The Maryland case was still less an authority. The beneficiary had made no assignment. The case was that of a creditor endeavoring by garnishment process to reach the fund in the hands of the trustee, to satisfy a debt due by the beneficiary. The trustee held under a will by which he was empowered to collect the rents and profits, and pay them to his son Robert, 'into his own hands, and not into another, whether claiming by his authority or otherwise.' The power of anticipation and alienation was thus expressly withheld. The trust was sustained, and the creditor properly repelled.

"The legal title to the property conveyed, under the trust under consideration, being in the trustee, Henson, and the equitable interest in the beneficiary, Hamilton, and they having joined in a conveyance, operates to pass the estate for life to the mortgagee. The demurrer was properly sustained, and the decree affirmed."

It will be noted that the reason the interest of the beneficiary could not be reached by a creditor through the instrumentality of a court of chancery was due to Sections 4282-4285, Code of Tennessee, which changes the common law. We think the language underlined applies equally to the case at bar.

In Lewin's Law of Trusts, page 692, the following appears:

"It may be laid down as a general rule that an equitable interest may be assigned though it be a mere possibility, and that, either with or without the intervention of the trustee. And the assignee of the cestui que *trust may call upon the trustee to clothe the equitable interest with the legal estate and on his refusal, may, by suit compel a conveyance without making the assignor a party."*

In *Perrine v. Newell,* 23 Atl. (N. J. Eq.) 493, the court said:

"McGill, Ch. The object of the bill is to secure the payment of $1000 with interest, out of the farm hereinafter mentioned. By his will, dated on the 19th of June, 1859, James Newell devised to William Newell and Elijah W. Dunn his farm at Lower Penn's Neck, in the county of Salem, containing about 245 acres, whereon his son, Charles B. Newell, then lived, with other lands, in trust, to rent the same from time to time, and pay to Charles B. Newell, during his life, the rents and profits thereof, and continued in these words: 'And at the death of said Charles B. Newell, I do give and devise all these said lands, houses and premises to his three children, Eliza Bradway, Charles Newell, Deborah Tuft, his children; to them, their heirs and assigns forever.' On April 29, 1872, after the death of James Newell and after his will had been duly admitted to

probate, the son, Charles B. Newell, and his children Charles W. B. Newell, Eliza A. Bradway and Deborah Tuft, who were all then of age, in order to enable them to rebuild embankments along the Delaware river, upon which a portion of the farm fronts, to protect the farm from inundation, borrowed $1000 from John Hershon, executing and delivering to him their bond conditioned for the payment of that sum in three years, with interest at 7 per cent per annum, and on the same day made and delivered to him their mortgage of the farm to secure the payment of that bond. In February, 1875, Hershon assigned the mortgage to John Perrine. Perrine died in April, 1886, leaving a will afterwards duly admitted to probate, of which the complainant is executrix. At the time of the execution of the mortgage Charles W. B. Newell was married. His wife still lives, and is a defendant to this suit. Eliza A. Bradway and Deborah Tuft were also, at the time of making the mortgage, married, and their husbands survive and are parties defendant in this suit. Neither the wife of Charles W. B. Newell nor the husbands of Eliza Bradway and Deborah Tuft joined in the execution of the bond and mortgage. The bill alleges the purpose for which the mortgage was given, and that the embankments were constructed with the moneys and from it, and that such work was necessary for the preservation of the farm, and it asks dual relief; that the mortgage may be foreclosed; also, that the money due upon it may be charged upon the farm and paid thereout. Only the trustees, William Newell and Elijah W. Dunn, answer; and they claim that complainant's right is subject to a lien upon the trust property which the law gives them for disbursements they have made in the performance of their trust, and allege that such disbursements amount to a large sum.

"The first question to be considered is whether the children of Charles B. Newell, at the time the mortgage was made, had an estate in the farm which they

could mortgage. It is observed that the will provides that the trust shall continue during the life of Charles B. Newell, adding and at the death of the said Charles B. Newell, I do give and devise, etc. In *Port v. Herbert's Ex'rs,* 27 N. J. Eq. 540, John Herbert, by his will, devised lands to his executors to hold in trust for the use of his son-in-law, Abraham Post, in order that Post might enjoy the possession, rents and profits of the lands until the youngest child of his wife should attain the age of 21 years, and 'after the said youngest child' should attain the age of 21 years, the land was to be sold and the proceeds of sale divided among the wife's children. Chief Justice Beasley, pronouncing the opinion of the court of errors and appeals, stated the rule to be that a bequest to A. 'at' a given age or marriage, or 'when' or 'from' and 'after' his attaining a given age, is *prima facie* contingent, but that the rule is subject to exceptions, which, with the rule, are very distinctly stated and explained by Vice-Chancellor Wigram in the case of *Peckham v. Gregory,* 4 Hare 398, in this language: 'If there is a gift to a person at twenty-one, or on the happening of any event, or a direction to pay and divide when a person attains twenty-one, there, the gift being to persons answering a particular description, if a party cannot bring himself within it, he is not entitled to take the benefit of the gift. There is no gift in those cases, except in the direction to pay, or to pay and divide. But if, upon the whole will, it appears that the future gift is only postponed to let in some other interest, or, as the court has commonly expressed it, for the bentfit of the estate, the same reasoning has never been applied to the case. The interest is vested, notwithstanding, although the enjoyment is postponed.' Applying this rule to the case then considered, the chief justice said: 'Now, in the present case, it seems to me that the purpose of the testator in deferring the payment to the childrn of these legacies until the youngest should become of age is perfectly manifest. It was to keep the family together

and provide a house for all the children until the period of distribution. I am at a loss to perceive any other motive for this provision. The payment, most evidently, was not postponed on account of anything personal to the legatees. * * * Without looking for the intention in other parts of the will, I think, from this clause alone, the purpose to postpone the payment of these legacies was solely for the convenience of the estate, and to let in the interest deposited in the son-in-law, is unmistakably shown.' The conclusion drawn was in affirmance of the chancellor's opinion (reported in 26 N. J. Eq. 278), that the children of the testator's daughter had taken vested interests at the tsetator's death. The doctrine thus laid down has been adopted in several other cases in this state. *Fairly v. Kline,* 3 N. J. Law 754; *Wintermute v. Snyder,* 3 N. J. Eq. 489; *Howell v. Green,* 31 N. J. Law 570; *Van Dyke v. Vanderpool,* 14 N. J. Eq. 198; *Feit's Ex'r v. Vanatta,* 21 N. J. Eq. 64; *Beatty's Admr. v. Montgomery's Ex'r,* Id. 324; *Van Blarcom v. Dager,* 31 N. J. Eq. 786; *Vallentyne v. Wood,* 42 N. J. Eq. 552, 9 Atl. Rep. 582; *Rhodes v. Shaw,* 43 N. J. Eq. 430, 11 Atl. Rep. 116.

"In the case now considered, it is apparent by the deferring possession under the devise to the children, the testator's purpose was to let in a trust estate for the life of their father. The life estate was guarded by a trust designed to secure its continuous beneficial enjoyment by the testator's son, who would naturally care for his children. For some reason, undisclosed by the will, the testator deemed it unwise to bestow any legal estate upon his son; and yet it is plain that he designed for him and for his children the benefits which would naturally flow from the fee—that is, the use of the land by the son for life in the maintenance of his family, and the remainder to the son's children. The assurance of this course by the testator was a mere arrangement for the convenience or safety of the estate. No reason appears, personal to the children of Charles,

why their interests should be postponed. I think that this case is clearly within the rule adopted in *Post v. Herbert's Ex'rs,* and that the children of Charles B. Newell, at the death of their grandfather, took a vested remainder in the fee in the farm subject to the trust estate for the life of their father. This being so, they could mortgage their interest.

"In the next place it is too clearly established to need citation of authority that Charles B. Newell, as cestui que *trust, could assign or mortgage his beneficial interest in his father's estate, subject, however, to such rights as the trustee may have in it. The father and children, then could give the mortgage in question."*

If the beneficiary under the above trust could have mortgaged his interest, we do not understand how it could be said that the beneficiary under the trust deed in consideration could not mortgage or assign his interest.

In *Debrell v. Carlisle,* 48 Miss. 709, the court says:

"A *cestui que* trust may lawfully dispose of his estate, notwithstanding his title is contested by the trustee, for the latter can *never* disseize the founders of the trust estate; but so long as it continues *the possession of the trustee is treated at least in a court of equity as the possession of the* cestui que *trust. Baker v. Whiting,* 3 Sumner (U. S.) , 45 Fed. Cas. No. 787."

Sullivan v. Redfield, Fed. Cas. 13957:

"I consider it to be settled that an assignment by a *cestui que* trust of an equitable interest by way of a contingent remainder in either realty or personalty made for a valuable consideration, is effectual to pass the interest of the assignor, and substitute the assignee in place of the assignor as *to all the*

rights which in any event might or would have accrued to the assignor.

"In *Varrik v. Edwards,* Hoff., Ch. 382, the vice chancellor reviewed the decisions on this subject and it is quite unnecessary to restate them here. I apprehend there has been no real question on this point for many years."

Tillinghast v. Bradford et al., 4 R. I. 205:

"The nature of the debtor's interest in the trust property under his father's will was an equitable estate for life, with a power of disposing of the remainder in fee by will; in default of such disposition such remainder to be conveyed to his heirs at law, there being also a clause in the will against anticipation and alienation of the rents and profits during the debtor's life. It is quite clear that it was the intention of the testator to make an alimentary provision for his son during life which should give him all the advantages of an estate in fee without the legal incidents of such an estate—alienable unless by will, and subjective to the payment of the son's debts. Such restraints, however, are so opposed to the nature of property—and, so far as subjectiveness to debts is concerned, to the honest policy of the law—as to be totally void unless included, which is not the case here, in the event of its being attempted to be alienated or seized for debts it is given over by the testator to some one else. This has been the settled doctrine of a court of chancery at least since *Brandon v. Robinson,* 18 Ves. 429, and an application to such a case as this is so honest that we would not change it if we could. Certainly no man should have an estate to live on but not an estate to pay his debts with. Certainly, property available for the purpose of pleasure or profit should be also amenable to the demands of justice."

Sparhawk v. Cloon, 125 Mass. 263:

"J. Gray. At law, any property, rent or personalty that a man owns may be alienated by him, or may, unless specially exempted by statute, be taken for the payment of his debts; and no form of grant or devise can enable the grantee or devisee to hold the estate without its being subject to alienation, attachment and execution. Co. Set. 232a. Blackstone, *Bank v. Davis,* 21 Pick. 42.

"From the time of Lord Eldon the same rule has prevailed in the English Court of Chancery to the extent of holding that where the income of a trust estate is given to any person (other than a married woman) for life, *the equitable estate for life is alienable by and liable in equity to the debts of the* cestui que *trust, and that this quality is so inseparable from the estate that no provision, however expressed, which does not operate as a cessor or limitation of the estate itself can protect it from his debts. Brandon v. Robinson,* 18 Ves. 429; S. C. 1 Rose 197; *Rochford v. Hackulan,* 9 Hore 475; 2 Spense Eq. Juris. 89, and cases cited.

"The English doctrine has been approved in many decisions and dicta in this country. *Tillinghast v. Bradford,* 5 R. I. 205; *Melbane v. Melbane,* 4 Ire. Eq. 131; *Heath v. Bishop,* 4 Rich. Eq. 46; *Smith v. Moore,* 37 Ala. 327; *McIllvaine v. Smith,* 42 Misso. 45; *Sanford v. Lackland,* 2 Dillon 6; Seague, J., in *Nichol v. Levy,* 5 Wall. 433, 441.

"On the other hand it has been maintained by judges whose opinions are entitled to the highest respect, that the founder of a trust may secure the enjoyment of it to other persons, the objects of his bounty, by providing that it shall not be alienable by them or be subject to be taken by their creditors; and that his intention in this regard, *when clearly expressed by him,* must be carried out by the court."

Hutchinson v. Maxwell, 57 L. R. A. 387 (Virginia):

"It is well settled in this country and in England, from which country we derive the principles of our jurisprudence, that a gift or grant of a beneficial estate, in fee or absolutely, whether legal or equitable, has certain legal incidents of which the estate cannot be devested, and all conditions adopted for that purpose are necessarily repugnant and void. Among those incidents are the donee's or grantee's power of alienating such estate, and its liability for his debts. Co. Litt. 223a; *Brandon v. Robinson,* 18 Ves. Jr. 429; 2 Minor, Inst. 4th ed. 287, 288; Gray, Restraints on Alienation of Property, 2d ed., sections 105, 134.

"The reason of this doctrine or principle is the repugnancy of such restraints upon the ordinary rights of property, and that property would thereby be withdrawn from the ordinary rules and channels of commerce and trade.

"In Co. Litt. 223a, in discussing conditions against alienation, it is said: 'The like law is of a devise in fee upon condition that the devisee shall not alien, the condition is void; and so it is of a grant, release, confirmation or any other conveyance whereby a fee simple doth pass. For it is absurd and repugnant to reason that he hath no possibility to have the land revert to him should restrain his feoffee in fee simple of all his power to alien. And so it is if a man be possessed of a lease for years, or of a horse, or of any other chattel, real or personal, and give or sell his whole interest or propertie therein, upon condition that the donee or vendee shall not alien the same, the same is void, because his whole interest and propertie is out of him, so as he hath no possibilitie of a reverter; and it is against trade and traffique and bargaining and contracting between man and man.'

"The case of a settlement upon a married woman, or in reference to coverture, is an exception, or apparent exception, to the general rule that conditions restraining the power of alienation and exempting property from the liability for the debts of the owner are repugnant and void. But the whole doctrine of the equitable separate estate of a married woman is the creature of equity—the invention of the chancellors—and sets at naught many of the principles of the common law. 2 Minor, Inst. 4th ed. 648.

" 'When this court,' said Lord Cottenham in *Tullett v. Armstrong,* 4 Myl. & C. 377, 'first established the separate estate, it violated the laws of property as between husband and wife; but it was thought beneficial and it prevailed. It being once settled that a wife might enjoy separate estate as a *feme sole,* the laws of property attached to this new estate; and it was found, as part of such law, that the power of alienation belonged to the wife, and was destructive of the security intended for it. Equity again interfered, and, by another violation of the laws of property, supported the validity of the prohibition against alienation.' *Buckton v. Hay,* L. R. 11 Ch. Div. 645.

"It is also well settled in England that the right of alienation and liability for debts are inseparable incidents of a life estate, whether limited by way of trust or otherwise, except in cases where there is a termination or limitation over of the estate dependent upon attempted alienation or seizure by creditors. *Brandon v. Robinson,* 18 Ves. Jr. 429; *Graves v. Dolphin,* 1 Sim. 66; *Rochford v. Hackman,* 9 Hare 475; Gray, Restraints on Alienation of Property, Section 134.

"It is also equally well settled in this country, even in those jurisdictions where 'spendthrift trusts' are upheld, that liability for debts is an inseparable incident of a legal life estate. In the case of *Hahn v. Hutchinson,* 159 Pa. 138, 139, 28 Atl. 167, in the

supreme court of Pennsylvania, where such trusts seem to have had their origin, it was held, following prior decisions, that, 'in order to protect the estate from creditors, the legal estate must be in the hands of a trustee, and, if the equitable estate became merged in the legal, it could be immediately seized in excution by creditors.' Prof. Gray, who has given this subject the most thorough investigation, in his work on Restraints on Alienation, says there is not a shred of authority on either side of the Atlantic in favor of the doctrine that a life tenant of the legal estate in land can be restrained from alienation. Sections 138, 134. In our investigation, we have found no case holding a contrary doctrine, unless it be some Illinois cases referred to by Prof. Gray. At least, the overwhelming current of authority is that a legal life estate is subject to the legal incidents of property, one of which is that it is liable for the owner's debts. *Ehrisman v. Sener,* 162 Pa. 577, 29 Atl. 719; *Wellington v. Janvrin,* 60 N. H. 174; *McCleary v. Ellis,* 54 Iowa 311, 37 Am. Rep. 205, 6 N. W. 571; *Maynard v. Cleaves,* 149 Mass. 307, 21 N. E. 376.

"If liability for debts is an inseparable incident of a legal life estate, as it unquestionably is, why should it not be an inseparable incident of a like estate in equity? One reason why it is an inseparable incident of property at common law is that it is against public policy that a man 'should have an estate to live on, but not an estate to pay debts with.' Does not this reason apply as much to equitable estates as to legal? A restraint on alienation and freedom from liability for debt are as much against public policy in the one case as in the other. The English chancery courts recognized this, and applied the rule of the common law to equitable estates. They did not ingraft any new doctrine on the common law, as is suggested in some of the cases which uphold spendthrift trusts; but, as Prof. Gray shows conclusively, 'they walked scrupulously in the ancient ways of the law, and it is these late cases

which have departed from the principles of the common law as much as they have from the precedents in equity.' 'The common law,' as he says, 'held that legal estates of freehold, whether in fee simple or for life, should not be inalienable; and chancery held the same of equitable estates of freehold. The common law held that a legal life estate might be made determinable on alienation, and chancery held the same of an equitable life estate.' Section 256.

"Not only did courts of equity, in the furtherance of a wise public policy, recognize the fact that equitable as well as legal estates should not be withdrawn from commerce, and should be liable for the obligations of the owner, but at an early day, very soon after we had severed our connection with the mother country, the lawmaking power of this state, by an act regulating conveyances, which went into effect January 1, 1787, and which, with some verbal changes, is found in section 2428 of the Code of 1887, declared that 'estates of every kind, holden or possessed in trust, shall be subject to debts and charges of the persons to whose use, or to whose benefit, they are holden or possessed, as they would be if those persons owned the like interest in the things holden or possessed, as in the uses of trusts thereof.' 12 Hen. Stat., chap. 62, p. 157; 1 Rev. Code 1819, chap. 99, section 30.

"This statute makes the equitable estate of the *cestui que* trust liable for his debts to the same extent as if he were the legal owner of the same. If a condition is annexed to a legal life estate that it shall not be liable for the owner's debts, it is void. Why, then, is not a like condition annexed to an equitable life estate void also?

"The legislation of the state shows that it was the object and policy of the legislature to make all estates, where the owners are *sui juris,* liable for debt, whether legal or equitable, except such as might be exempt by express statutory provisions. The effect

of upholding spendthrift trusts would be to encourage idleness and lessen enterprise, and to foster a class who become more and more reckless and indifferest to their honest debts, from a sense that they are hedged in by the law beyond the reach of their creditors.

"The decisions of the American courts upon this question are conflicting, and the reasoning of the cases which uphold spendthrift trusts is unsatisfactory, and, as it seems to us, at war with well-settled principles of law as to the incidents of property, whilst the English courts of chancery, and the American cases which follow them, even if our statute did not make a debtor's equitable property liable for his debts to the same extent as if he were the legal owner, seem to us to be sustained by the better reason, and in furtherance of a wise public policy. Whatever rights, whether legal or equitable, a person *sui juris* has in property, ought to be, and we think are, liable for his debts, except so far as is exempt therefrom by statute. Whatever rights of property the *cestui que* trust can demand from his trustees, his creditors ought to have the right to subject to the payment of their debts, unless his rights are so connected or blended with the rights of others that they cannot be subjected without prejudice to the latter's rights. *Nickell v. Handly,* 10 Gratt. 336, 339.

"Having reached this conclusion, the provisions in the deed of Mrs. Maxwell must be held to be void in so far as they declare that the property rights which her husband acquired under the deeds shall not be liable for his debts.

"The next question is, What rights of property did the husband acquire by the deeds?

"By the first-mentioned deed, filed with the bill, and marked 'Exhibit B,' he acquired an absolute equitable estate in the horses and other personal property described in clause number 1 of that deed,

or in the proceeds thereof, in the event if the trustee sold the same, as he had authority to do under the provisions of the deed. Under that deed, and the other deed filed with the bill, marked 'Exhibit C,' he was entitled to what, in the judgment and discretion of the trustee, would be a proper and comfortable support and maintenance out of the rents and profits of the farm conveyed by the first-named deed, and out of the income, rents and profits of the property conveyed by the second-named deed, after paying taxes, insurance and necessary expenses of administering the trust, and which were made prior charges upon the profits and income received by the trustee from the farm and from the property conveyed by the other deed. And the husband was further entitled, under the provisions of the first-named deed, to the annual interest or income on so much of the rents and profits of the farm as were not necessary for the said proper and comfortable support and maintenance of the husband, and which the trustee was required by the deed to invest as a capital sum or interest-bearing fund.

"We are of opinion, therefore, that the appellants have the right to have subjected to the payment of their debts, so far as may be necessary, the horses and other personal property conveyed by clause numbered 1 of the deed marked 'Exhibit B,' and filed with the bill, or the proceeds thereof, if that property has been sold by the trustee, and so much of the rents, profits and income derived by the trustee from the other property conveyed by, and also the fund invested under, the two deeds, after paying the prior charges of taxes, insurance, etc., charged thereon, as the husband would be entitled to receive for his proper and comfortable support and maintenance under the provisions of the said deeds.

"It is true, there is a discretion vested in the trustee by the deeds as to what amount of the rents, profits and income arising from the property conveyed shall be applied to the husband's support and

maintenance; but it seems to be settled that where trustees are directed to apply the income of a trust fund for the support and benefit of the debtor, and for other purposes, but have no right to exclude the debtor, then the assignee and the creditors can claim from the trustee the amount which the debtor could have claimed should have been applied to his benefit. *Page v. Way,* 3 Beav. 20; *Kearsley v. Woodcock,* 3 Hare 185; *Rippon v. Norton,* 2 Beav. 63; *Wallace v. Anderson,* 16 Beav. 533; and *Gray, Restraints on Alienation of Property, 159.*"

It is conceived that the foregoing decisions coming as they do from courts of eminent standing all over the country will be given considerable weight. These cases hold that even in the trust deeds where the trustee has an active duty to perform, the *cestui que* trust may (1) alienate his interest whatever it may be and that it is liable for the payment of his debts, and (2) that the assignee is substituted in the place of the *cestui que* as to all the rights which in any event might or would have accrued to the beneficiary.

We think we are justified in concluding that the act of the *cestui que* trust in the case at bar of going into possession at the time the outstanding lease expired was a sufficient exercise of his discretionary right to reside upon the premises and use them for grazing or agricultural purposes. Further, in determining what interest the beneficiary took, the fact that aside from the question of whether it was an active or passive trust, Davis was clothed with the exclusive equitable title together with the right

of possession—thus being able to maintain ejectment even against the trustee, must not be lost sight of.

Assuming the trust was active, the assignee Sumner having gone into possession as soon as the transfer was made, and having succeeded to all Davis' rights in so far as his interest would be concerned, we maintain that no act of the purported trustee could affect his right whatever.

Assuming the trust was active, the conveyance made by Davis to his assignee Sumner carried with it *the right to posscssion to an undivided one-half; hence the trustee had no right to deal with the property so conveyed and could give no title.* Or perhaps it could be said to be a voidable one at most. The burden, however, would be on the defendant in error to show the act of the trustee was subsequently ratified by Sumner.

It would follow if the trust was active or passive, the defendant in error has failed to show he has the right to possession against the plaintiff in error, because he has failed to show a conveyance of that right from the owner thereof.

It follows that the evidence sought to be introduced by the plaintiff in error ought to have been received, as it tended to show that the defendant in error had no title to the premises set out in his complaint.

III.

THAT THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN HOLDING AND DECIDING THAT NO ERROR HAD BEEN COMMITTED BY THE TRIAL COURT AS ALLEGED IN THE FOLLOWING EIGHTEENTH ASSIGNMENT OF ERROR:

"18. That the court erred in sustaining the objection of plaintiff to and rejecting the offer of the defendant of a certain mortgage from Robert Wyllie Davis and wife to John K. Sumner, dated January 2, 1906, and recorded on March 4, 1908, in the office of the Registrar of Conveyances of the Territory of Hawaii, in liber 303, at page 91, whereby the said Robert Wyllie Davis conveyed by way of mortgage to the said John K. Sumner an undivided one-half interest in and to the land of Mokapu.

"Plaintiff's objection was that this evidence was incompetent, irrelevant and immaterial, and that defendant was estopped from introducing such mortgage in evidence."

The defendant in error advances the same argument under the above point as advanced under point III.

IV.

THAT THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN ITS JUDGMENT AFFIRMING THE JUDGMENT OF THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT OF THE TERRITORY OF HAWAII,

FOR THE REASON THAT SAID JUDGMENT WAS AND IS CONTRARY TO THE EVIDENCE AND THE LAW.

Under the above specification of error the plaintiff in error makes the following points:

(a)

That the judgment entitles the defendant in error to a paid up lease, while the evidence shows his interest is subject to the rents and other conditions which are contained in the lease.

An examination of the lease under which the defendant in error claims shows clearly that the defendant in error's interest is subject to the payment of rents, taxes, assessments and all other covenants in the lease which is attached to the defendant in error's complaint and marked "Exhibit A."

The defendant in error did not introduce any evidence relative to the payment of rent. In view of the fact that (under the theory that the trust was active) the plaintiff in error was the equitable owner of the premises and entitled to the rents thereof, we fail to understand upon what theory it could be said that the defendant in error was entitled to a paid up lease as against the plaintiff in error.

In *German Am. Sav. Bank v. Gollmer,* 155 Cal. 684, the owner of a leasehold interest sought to have its claim quieted and the judgment failed to contain some of the stipulations of the lease which plaintiff's

claim was subject to. The court used the following language:

"By its decree the trial court adjudged that the plaintiff was the owner of the leasehold interest described in the complaint, subject, only, to the payment of said rents, and the covenant for the payment of increased taxes, and that such estate for years so owned was not subject to any condition, covenant, agreement or obligation. * * *

"Assuming for the moment that all the findings of the trial court are sufficiently sustained by the evidence, the judgment was nevertheless too broad in its terms, and is not entirely supported by the findings. As we have seen, it is claimed therein that the plaintiff is the owner of the leasehold interest described, subject only to the payment of said stipulated rents and the covenant for the payment of increased taxes and free from all other conditions, covenants, agreements and obligations imposed by the instrument constituting the lien. There were obligations imposed upon the lessee by this instrument and those specified in the judgment, such as the provision that no business other than the banking business or some class of business for the carrying on of which a stipulation had already been made, could be conducted on the demised premises without the consent, in writing, of the lessor. The only supposable theory which a judgment freeing the lessee from this and other obligations imposed by the lease could rest is the one suggested by the plaintiff, viz., that the consent to the assignment not only disposed with but put an end to the difficulty forever, leaving the assignee free to again assign without consent, etc. *It follows that assuming the findings to be sustained by the evidence, the judgment should have gone no further than to decree the plaintiff to be the owner of the leasehold interest, subject to all the conditions, covenants, obligations and stipulations contained in the lease, save and except the single*

condition against assignment. We have said this much as to the form of the judgment only for the guidance of the parties in further proceedings in the case, as the judgment must be reversed for another cause."

We believe that the reasoning advanced in the above citation applies to the case at bar. No doubt the judgment should have decreed (under the theory of the trial court) that the defendant in error's claim in the land was subject to the conditions of the lease under which his rights were based. It follows that the judgment is contrary to the law and contrary to the evidence, for the reason that it entitles the defendant in error to a paid up lease.

(b)

That the court should have decreed the interest of the plaintiff in error to the premises set out in the defendant in error's complaint.

Under the theory that the trust was active, the evidence introduced by the defendant in error showed that the plaintiff in error's title to an undivided half of Mokapu was as good as the defendant in error's. It showed that the plaintiff in error was the equitable owner of all the property contained in the lease which was set out in the defendant in error's complaint. During the trial of the within action, counsel for the defendant in error made the following statement relative to the title of the plaintiff in error in and to the subject matter of the within action:

"We admit that Robert Wyllie Davis took a half of our term of years, twenty-five (25) term of years."

In explaining the above admission, counsel for the defendant in error used the following language in his brief filed in the Supreme Court of the Territory of Hawaii on the 11th day of January, 1915:

"We have admitted that the defendant is entitled to an undivided one-half of the twenty-five (25) year term granted June 1, 1910. But we insist that the plaintiff is entitled to the remaining one-half interest in said term, which we have proved that the plaintiff owns through the conveyance of the said last remaining one-half of the said term of years unto the said plaintiff Harrison."

As the within action was brought for the purpose of determining the adverse claim of the plaintiff in error, the decree should have set out his interest in and to an undivided one-half of the land of Mokapu.

As was said in *Kahoiwai v. Limeau,* 10 Haw. 507:

"The plaintiff by the statute, may proceed against any person who claims adversely and *whose claim he desires to have determined.*"

In *Pennie v. Hildreth,* 22 Pac. (Cal.) 398, the Supreme Court of California used the following language in an action brought under a similar section:

"If the defendant had an equitable title to one-half of the property in controversy whether that interest was subject to the mortgage of the plaintiff, or paramount to it, he had a right to have it so decreed and the interest of the plaintiff so declared; and a judg-

ment against him on demurrer that he had no right, title or interest in the property would have been erroneous if the answer had been sufficient in other respects."

Could it be argued that the plaintiff in error having failed to set out his claim in his answer he is not entitled in this action to have the same decreed?

Under the Hawaiian decisions a defendant may prove his claim, without specially pleading it under an answer of a general denial.

In *Hakalau Plantation Co. v. Kahuena,* 14 Haw. 189, the question was presented as to whether or not a defendant could prove title to the land in controversy under the general denial. The court had the section of the Revised Laws under which the within action was brought under consideration and used the following language:

"But under our statutes, need they amend their answer in order to set up an advverse claim? It may be the better doctrine or the better practice, that defendants should be required, as is often held under other statutes elsewhere, to set forth in their pleadings in actions of this kind their adverse claims in order to be permitted to prove them at the trial, and perhaps this would be a proper subject for a rule of court, but in our opinion it is not necessary to do so under our statutes. The statute which provides for actions of this kind does not, in terms require it (any more than the statute that relates to ejectment), although it provides that if the defendant disclaims or suffers judgment to be taken against him without answer, the plaintiff shall not recover costs—a very natural and proper provision in a statute of this kind. But there is nothing expressly requiring a

defendant to set forth his claim affirmatively in his answer. True, this is so, also, in most statutes of this kind elsewhere, but where an affirmative plea has been held necessary elsewhere, the code pleading has prevailed, law and equity proceedings have been united, and proceedings of this kind have been treated largely as recognitions of former equity proceedings. With us, the distinction between law and equity procedure has been maintained, actions to quiet title have been regarded as purely actions at law, and what is of special importance in any law case, the answer under our statute may be a general denial under which 'any matter of law or fact whatever' may be given as a defense. This provision has been regarded as applicable to all law cases, and in the absence of any provision to the contrary we feel obliged to hold it applicable to actions to quiet title. * * * As shown above, it has been held repeatedly in that state that defendants in actions of this kind need not set forth their adverse claims in their answers for the reason that they can present any defense under the general denial."

CONCLUSION.

In conclusion the attention of the court is called to the four separate grounds hereinafter set forth, any one of which we believe to be sufficient to secure a reversal of the judgment of the Supreme Court of the Territory of Hawaii.

In brief, these grounds are:

1. That the Supreme Court of the Territory of Hawaii erred in affirming the action of the Honorable W. L. Whitney, Second Judge of said circuit court, in denying the motion of the defendant in said action, plaintiff in error, for a judgment of non suit,

for the reason that the statute of uses executed the use.

2. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that no error had been committed by the trial court, as alleged in the following seventeenth assignment of error:

"17. That the court erred in sustaining the objection of plaintiff to and rejecting the evidence offered by defendant of a deed from Robert Wyllie Davis and wife to John K. Sumner, to an undivided one-half interest in the land known as Mokapu, dated January 1, 1906, and recorded on March 4, 1908, in liber 302, on page 192.

"Plaintiff's objection was that it was incompetent, irrelevant and immaterial and defendant was estopped from introducing any such deed in evidence."

3. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that no error had been committed by the trial court as alleged in the following eighteenth assignment of error:

"18. That the court erred in sustaining the objection of plaintiff to and rejecting the offer of the defendant of a certain mortgage from Robert Wyllie Davis and wife to John K. Sumner dated January 2, 1906, and recorded March 4, 1908, in the office of the Registrar of Conveyances of the Territory of Hawaii, in liber 302, at page 91, whereby the said Robert Wyllie Davis conveyed by way of mortgage to the said John K. Sumner an undivided one-half interest in and to the land of Mokapu.

"Plaintiff's objection was that this evidence was incompetent, irrelevant and immaterial, and that de-

fendant was estopped from introducing such mortgage in evidence."

4. That the Supreme Court of the Territory of Hawaii erred in its judgment affirming the judgment of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, for the reason that said judgment was and is contrary to the evidence and the law.

It is therefore most earnestly urged by counsel for plaintiff in error that in the light of the decisions cited in the within brief and the manifest error of the lower court both in refusing to admit the evidence offered by plaintiff in error and failure to decree the plaintiff in error's interest in and to the subject matter, this court will reverse the case with such direction as justice and the law may require.

Repectfully submitted,

Dated April 10, 1916.

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